United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

6-30-R/R

(1)

BRIEF FOR APPELLANT

307

In The United States Court Of Appeals
For The District Of Columbia Circuit

Case No. 23,535

UNITED STATES OF AMERICA,

Appellee

v.

CEDRIC GILLIAM,

Appellant

Appeal From A Judgment Of Conviction
In The United States District Court
For The District of Columbia

ARTHUR STAMBLER

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Court-Appointed Counsel
For Appellant Cedric Gilliam

September 26, 1969

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IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Appellee	)	
	)	
vs.	)	No. 22,535
	)	
CEDRIC GILLIAM,	)	
	)	
Appellant	)	

BRIEF FOR APPELLANT

COMES NOW, Cedric Gilliam, Appellant in the above-numbered appeal, and by his court-appointed counsel submits herewith his Brief on Appeal.

A. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I-WHETHER APPELLANT'S LACK OF ASSISTANCE OF COUNSEL AT A COVERT PRELIMINARY HEARING CONFRONTATION BETWEEN APPELLANT AND THE VICTIM OF THE CRIME WITH WHICH APPELLANT WAS CHARGED VIOLATED THE MANDATE OF UNITED STATES V. WADE, 388 U.S. 218 (1967)?

II-WHETHER THE TRIAL COURT'S INSTRUCTION TO THE JURY THAT APPELLANT'S FLIGHT COULD BE USED TO INFER GUILT, WITHOUT ALSO EXPLAINING THAT FLIGHT MIGHT BE PROMPTED BY A VARIETY OF OTHER MOTIVES, WAS REVERSIBLE ERROR?

Pursuant to Rule 8(d), General Rules - USCA, the Court is respectfully advised that the pending case has not previously been before this Court.

B. REFERENCES TO RULINGS

This Court's attention is respectfully directed to Page 20 of the reporter's trial transcript in which the trial court ruled that Witness Thelma Blaine was qualified to make an in-court identification of the defendant.

STATEMENT OF THE CASE

This is an appeal from a conviction of armed robbery. Appellant, Cedric Gilliam, was charged with the armed robbery, on March 5, 1968, of the Cakemaster Bakery in Washington, D. C. Gilliam was indicted by a Grand Jury on April 30, 1968, and convicted of armed robbery (22 D. C. C. 2901) by a jury after trial in the United States District Court for the District of Columbia, before Gasch, J., on August 22-23, 1968. He was sentenced on October 4, 1968, to an indeterminate term under the provisions of the Federal Youth Corrections Act. Thereafter, appellant filed a pro se Notice of Appeal in the District Court on October 29, 1968. Undersigned counsel was appointed by this Court, Bazelon, Ch. J., on November 19, 1968.

The indictment charged that Cedric Gilliam was one of two young men who entered the Cakemaster Bakery on the date in question and, after some brief conversation with the clerk, one

Thelma Blaine forced her at gunpoint to empty the contents of the cash register into a paper bag. Appellant was charged with holding the paper bag; an accomplice allegedly held the gun.

A police officer who was patrolling that particular block at the time saw two young men run out of the bakery and past him. He testified that he recognized one of these men as Gilliam, whom he had known for many years, since both the officer and Gilliam lived in the same neighborhood. A few minutes later the officer received a radio call that there had been a robbery at the bakery from which he had seen the men running. He returned to the bakery and determined that no one had left the premises since the two men who had robbed it. It was shortly thereafter that a warrant was issued for appellant's arrest, and he was taken into custody several days later. The accomplice was never apprehended. At trial Gilliam raised the defense of alibi. He contended that on the particular date and at the particular time in question he was elsewhere.

The victim initially identified Gilliam from photographs contained in police files. She subsequently identified him again at his arraignment, where he was not represented by counsel.

At trial the Court gave the jury an instruction concerning Gilliam's flight after the alleged commission of the crime which was patterned on the D. C. Bar Association instructions concerning a possible inference of guilt from the fact of flight.

C. ARGUMENT

I - APPELLANT'S LACK OF ASSISTANCE OF COUNSEL AT A COVERT PRELIMINARY HEARING CONFRONTATION BETWEEN APPELLANT AND THE VICTIM OF THE CRIME WITH WHICH APPELLANT WAS CHARGED VIOLATED THE MANDATE OF UNITED STATES V. WADE, 388 U.S. 218 (1967)

(a) The Sixth Amendment Requires The Assistance Of Counsel At Preliminary Hearing Confrontations Between Defendant And Witness, And Admission Into Evidence Of An Identification Made In Absence Of Counsel Is Reversible Error.

The Court's attention is respectfully directed to the following pages of the reporter's trial transcript: 3, 5-7, 10-23, 44, 49-50, 78-79, 110 117-119, 123.

In Mason v. United States, __U.S. App. D.C. ___, ___ F. 2d___ (No. 21,816, decided June 30, 1969) this Court held that there is no exception to the rule promulgated in United States v. Wade, 388 U.S. 218 (1967), for confrontations which occur at preliminary hearings. As will be shown below, the instant appeal

falls squarely within the purview of this Court's proper and inelectable conclusion in Mason, supra, and therefore Appellant Gilliam's conviction must be reversed.

The recognition that a defendant must be afforded assistance of counsel at all stages of a criminal proceeding if his constitutional rights are to be fully protected is hardly novel. Thirty-seven years ago the United States Supreme Court in Powell v. Alabama, 287 U.S. 45 (1932), recognized that the pre-trial period was perhaps the most critical period of the proceedings. The Court in Powell found that assistance of counsel must be afforded if the constitutional guarantees of fair trial were to be fully protected. The Powell principal was later applied to require assistance of counsel at an arraignment where rights of the defendant might be sacrificed or lost by an unintelligent response or waiver. Hamilton v. Alabama, 368 U.S. 52 (1961). This same principal was applied in Massiah v. United States, 377 U.S. 201 (1964). There the Supreme Court ruled that a defendant's incriminating statements should have been excluded from evidence since they were overheard by federal agents who, without notice to the defendant's attorney, arranged a meeting between the defendant and an accomplice who had become a prosecution informant.

Escobedo v. Illinois, 378 U.S. 478 (1964), followed the philosophy of Hamilton and Massiah in holding that the right to counsel was guaranteed at the point where an accused, prior to his arraignment, was secretly interrogated despite repeated requests to see his lawyer. Finally, in Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court in a sweeping decision held that the rules established for custodial interrogation included the right to counsel. The Court reasoned that its decision in Miranda and the previously announced rules in the above-cited cases were necessary to safeguard the privileged against self-incrimination from being jeopardized by such interrogation.

This series of decisions, beginning with Powell, supra, and ending with Miranda, supra, were all grounded on the Fifth Amendment. Next came United States v. Wade, supra, and Stovall v. Denno,[1] which, together with this Court's decision in Mason, supra, require a reversal of the appellant's conviction in the instant appeal. In Wade the Court substantially enlarged

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1 / 388 U.S. 293 (1967)

the right to counsel, shifting its emphasis here to the Sixth Amendment right of the accused to a speedy and public trial by an impartial jury, his right to be informed of the nature and cause of the accusation, his right to be confronted with the witnesses against him and to have compulsory process for obtaining witnesses in his favor. Although Wade dealt specifically with a post-indictment line-up, it also noted that:

> the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially derogate from a fair trial. 2/

Thus the Court held that the Sixth Amendment guarantees the right to counsel at any critical confrontation by the prosecution at pre-trial proceedings where the results might well determine the defendant's fate and where the absence of counsel might impair this right to a fair trial.

2/ 388 U.S. at 228

In Mason v. United States, __U. S. App. D. C. __, __F. 2d__ (No. 21,811, decided June 30, 1969), Mason was convicted of forgery and uttering for a fraudulent withdrawal from another's savings account. At Mason's preliminary hearing in the Court of General Sessions some two weeks after the offense, the victimized bank teller was told to sit among the spectators and watch the area where defendants awaiting hearings are seated, to see if she recognized anyone. She knew that the arrested suspect would appear in court, and she apparently also knew that he was the man whose photograph she had previously identified. She recognized Mason among a group of perhaps a dozen defendants seated in two rows at a distance from her of some 30 feet.

At this point there was some variance between the teller's testimony and that of the police detective who was also present in the courtroom. The teller claimed that she saw the defendant two or three minutes after her arrival, the detective testified the identification occurred one-half hour after she arrived. The teller testified that she sat by herself and that, a few minutes after she saw the appellant, the detective walked up to her and asked

her if she had recognized anyone. The contradictory testimony of the detective was that he sat together with the witness throughout and asked her nothing.

In these facts this Court held that Wade, supra, entitled a defendant to the assistance of counsel at identification confrontations such as this.[3] This Court noted the Supreme Court's suggestion in Wade, supra, that there is no reason why other identification confrontations should be any less critical than the post-indictment line-up at which the presence of counsel was required.[4]

Indeed, the only argument against a counsel requirement recognized by the Wade court is that it might forestall prompt identifications.

> . . . [A]ssuming that irreparable prejudice might result from unsupervised preliminary hearing confrontations -- an assumption

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3 / Slip Opinion, P. 10

4 / Slip Opinion, P. 4

> apparently compelled by Wade -- we can think of no sound reason why counsel should not be present at any such viewing. If legal assistance for indigent defendants is available anywhere, surely it may be obtained in the Court of General Sessions . . . Application of the Wade rule to preliminary hearings would do no more than extend similar protections to defendants who do not request counsel in situations where the police intend covertly to obtain identification evidence at the time of the hearing. 5/

In Russell v. United States, __U.S. App. D.C. __, __ F. 2d __ (No. 21,571, decided January 24, 1969), this Court held that in spite of its comprehensive language, Wade did not apply to on-the-scene identifications occurring moments after a criminal act occurred. This conclusion was reached because of the compelling countervailing policy considerations militating against delaying identification confrontations in those circumstances. But in Russell, the Court pointed to the Wade Court's expressed inability to find any substantial countervailing policy considerations against the requirement of the presence of counsel where time is not a factor.

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5 / Slip Opinion, pp. 5-6

Turning now to the particular facts of the instant case, it is clear that Appellant Gilliam's covertly arranged confrontation with the victim, Mrs. Blaine, at his preliminary hearing falls squarely within the ambit of Mason. Mrs. Blaine testified (Tr. 19-20) that she expected to see Gilliam appear in court on the morning of the hearing. She also stated (Tr. 15-19) that there were a number of other persons in that particular area of the courtroom. On cross-examination, defense counsel elicited that Mrs. Blaine definitely came to court with the idea that she was going to identify the perpetrator of the crime (Tr. 20). This impression in Mrs. Blaine's mind was confirmed by the Court's statement (Tr. 22). During this Wade-Stovall hearing prior to the commencement of the trial, the Court, over the objection of defense counsel, permitted the introduction into evidence of the preliminary hearing identification at trial (Tr. 23).

These same facts relating to Mrs. Blaine's identification of Gilliam at his preliminary hearing were repeated to the jury during the trial (Tr. 49-50). This testimony was critically damaging to Gilliam, as indicated by the Assistant United States Attorney's emphasis upon it in his summation to the jury (Tr. 110).

Viewing the totality of the circumstances surrounding this arranged confrontation between Gilliam and Mrs. Blaine, there can be no question that it was fully susceptible to the unfairness -- whether unintentional or deliberate -- with which the Wade court was expressly concerned. Mrs. Blaine was certainly expecting to view Gilliam and to identify him in that courtroom. In fact, she believed that his trial would take place that day (Tr. 20). As in Mason, she knew that he was the man whose photograph she had previously identified. Also as in Mason, a police officer was available for whatever encouragement might be needed in order to make a proper identification. The fact that any such police assistance may not have occurred was of no moment in Mason, and it has no relevance here. What is essential here is that this confrontation between Gilliam and Mrs. Blaine bears all the attributes of improper and unfair suggestion which prompted this court in Mason to hold that there is no exception to the Wade rule requiring the presence of counsel for confrontations which occur at preliminary hearings. As this Court observed in Mason:

Russell

> The Government relies on the fact that preliminary hearing viewings are matters of public record, lacking in secrecy and capable of reconstruction at trial by enterprising defense counsel. An absence of secrecy, however, is at best a modest benefit if no one is watching. So long as only the policeman and the witness know that an identification confrontation is in progress, the defendant will be hard put to discover the myriad subtle suggestions which may have passed from policeman to witness. Nor is there any likelihood that the many actors on the General Sessions stage, each absorbed in his own business, will recall the details of the parade of defendants which happened to serve as a line-up. 6 /

Appellant Gilliam does not here necessarily contend that the circumstances surrounding his identification confrontation with Mrs. Blaine were affected by deliberate bad faith on the part of either Mrs. Blaine or the police officer. What appellant does contend, and which compels the reversal of his conviction, is that the facts of this confrontation are obviously ripe with potential suggestion. 7 / Had Gilliam been represented by counsel

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6 / Slip Opinion, p. 9

7 / Slip Opinion, p. 10

at the preliminary hearing, the possible sources and risks of misidentification before the jury could have been substantially reduced. Admission into evidence of an identification at such a situation was found by this Court in Mason to be reversible error. A replica of the Mason confrontation at Appellant Gilliam's preliminary hearing caused the admission of evidence concerning that meeting also to be reversible error. The Wade and Mason decisions compel a finding by this Court that Appellant Gilliam's lack of assistance of counsel at his preliminary hearing during which he was identified by the victim commands the reversal of his conviction based on such identification. Gilbert v. California, 388 U.S. 263 (1967).

II-THE TRIAL COURT'S INSTRUCTION TO THE JURY THAT APPELLANT'S FLIGHT COULD BE USED TO INFER GUILT, WITHOUT ALSO EXPLAINING THAT FLIGHT MIGHT BE PROMPTED BY A VARIETY OF OTHER MOTIVES, WAS REVERSIBLE ERROR

(a) An Instruction To The Jury Asserting Or Implying That Flight May Be Evidence Of Guilt Is Plain And Reversible Error

This Court's attention is respectfully directed to pp. 180 and 181 of the reporter's trial transcript. In its charge to the jury at Appellant Gilliam's trial, the Court stated:

> Flight or concealment by a defendant after a crime has been committed does not create a presumption of guilt. You may consider evidence of flight, however, as tending to prove the defendant's consciousness of guilt. You are not required to do so, but you should consider and weigh the evidence of flight, if any, by the defendant together with all the circumstances and evidence in the case. And give it such weight as in your judgment it is fairly entitled to receive (Tr. 186).

The above is precisely the instruction concerning flight which this Court found both inadequate and erroneous in Austin v. United States, __ U.S. App. D.C. __, ___F. 2d__ (No. 22,044, decided May 27, 1969). In both Austin and the instant case, the trial judge used the language of the standard charge on flight written by the Junior Bar Section of the Bar Association of the District of Columbia. More than 70 years ago it was established law that an instruction to the jury that flight creates a presumption of guilt is clearly impermissible. Starr v. United States, 164 U.S. 627 (1897); Allen v. United States, 164 U.S. 492 (1896); Hickory v. U.S., 160 U.S. 408 (1896). But these cases also held that flight is a circumstance that can be laid before the jury as having a tendency to establish guilt. Nevertheless, the weakness of any such inference

has long been recognized. In Austin, supra, this Court pointed to the observation of the Supreme Court in Alberty v. United States, 162 U.S. 499 (1896):

> . . . It is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that the wicked 'flee when no man pursueth, but the righteous are as bold as a lion . . .' 8/

A half century later, the Supreme Court's attitude in Alberty, supra, was reiterated by this Court in Cooper v. United States, 94 U.S. App. D.C. 340, 345, 218 F. 2d 39, 41 (1954). Judge Prettyman, speaking for this Court, noted that an apparent demonstration of guilt can be both explained by terrorized innocence as well as by a sense of guilt. Judge Prettyman's language was cited approvingly by the Supreme Court in Wong Sun v. United States, 371 U.S. 471, 484 n. 10 (1963) which reiterated that we have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime.

8/ 162 U.S. at 511

In Miller v. United States, 117 U.S. App. D.C. 45, 325 F. 2d 707 (1963), Chief Judge Bazelon, speaking for this Court in a comprehensive and thoughtful opinion which contained references to a host of contemporary psychological and sociological studies, demonstrated that flight from crime may be prompted by a variety of motives other than guilt. In so doing he firmly laid to rest the archaic and simplistic philosophy which is responsible for the instruction in question in this case. This Court, in Austin, supra, cited Judge Bazelon's conclusion that the jury should be instructed in appropriate language that flight does not necessarily reflect feelings of guilt, and that feelings of guilt, which are present in many innocent people, do not necessarily reflect actual guilt.

The Austin Court recognized that Wong Sun and Miller

> have pointed inescapably to the fact that flight instructions should be used sparsely, and when used should be accompanied by a fuller explanation by the judge of the variety of motives which might prompt flight, and thus of the caution which a jury should use before making the inference of guilt from the fact of flight. It is apparent that the

> instruction in this case (and the D. C. Bar Association instruction which served as its basis) fell short of such a full explanation. 9/

This Court, although disapproving of the flight instruction in question, nevertheless held in Austin, supra, that while it was erroneous, it was not plain error under Rule 52(b) FED. R. CRIM. P. Appellant respectfully urges this Court that the giving of such an instruction is error of such substantial proportions that it amounts to plain error and is therefore grounds for reversal of his conviction. Trial counsel's failure in this case to raise formal objection to the giving of the flight instruction -- although he did question its propriety (Tr. 108) -- should not deter this Court from a finding that the instruction amounted to plain error by the trial judge. When the highest Court in the land has consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime, 10/ this Court must not sanction an instruction which -- by misleading the jury as to the significance of a flight that might appropriately be imputed -- has serve to deprive Appellant Gilliam of the fair trial to which he was entitled.

10/ Wong Sun v. United States, 371 U.S. 471, 483 n. 10 (1963).

Accordingly, this Court is respectfully urged to hold that the giving of the flight instruction in this case constitutes plain error under Rule 52(b) FED. R. CRIM. P., and that Gilliam's conviction must be reversed.

WHEREFORE, the premises considered, appellant Cedric Gilliam respectfully prays that his conviction in this case be reversed.

Respectfully submitted,

Arthur Stambler
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Court-Appointed Counsel for
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1737 DeSales Street, N.W.
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September 26, 1969

CERTIFICATE OF SERVICE

I, Lewis H. Goldman, an attorney in the Law Offices of Arthur Stambler, do hereby certify that I have this 30th day of September, 1969, served copies of the foregoing by first-class United States mail, postage prepaid, upon the following:

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Constitution Avenue and John
Marshall Place, N.W.
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Mr. Cedric Gilliam
Youth Center
Lorton, Virginia 22079

Lewis H. Goldman

REPLY BRIEF FOR APPELLANT

In the United States Court of Appeals
For The District of Columbia

Case No. 22,535

UNITED STATES OF AMERICA,

Appellee

v.

CEDRIC GILLIAM,

Appellant

Appeal From A Judgement of Conviction
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February 6, 1970

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UNITED STATES OF AMERICA,	)	
	)	
Appellee	)	
	)	
vs.	)	No. 22, 535
	)	
CEDRIC GILLIAM,	)	
	)	
Appellant	)	

REPLY BRIEF FOR APPELLANT

COMES NOW, Cedric Gilliam, Appellant in the above-numbered Appeal and, by his Court-appointed Counsel, hereby submits his Reply Brief.

There is no merit to Appellee's contention that the admission of what it concedes is a tainted identification at Appellant's trial (Brief for Appellee, p. 6) was harmless error. The Supreme Court in United States v. Wade, 388 U.S. 218 (1967) has made clear that a confrontation between the accused and the victim or witnesses to a crime for the purpose of eliciting identification evidence is subject to such strong conditions of unfairness that it may crucially derogate from a fair trial. Wade makes clear that the right to counsel is guaranteed by the Sixth Amendment at any critical confrontation by the prosecution at pre-trial proceedings where the results might well determine the defendant's fate and where the

absence of counsel might impair this right to a fair trial.

While the in-court identification of Appellant by the victim was not the sole evidence of identification at trial, there should be no question that without such identification Appellant could not have been found guilty. Therefore, it must be recognized that the severely damaging testimony of Mrs. Blaine, the victim, in which she identified Appellant as the perpetrator, is inextricably tied to and tainted by her presentment identification of Appellant at which he was not represented by counsel.

Appellee extracts from an entirely unrelated decision (Harrington v. California 395 U.S. 250 (1969)) the generalized statement that not all trial errors which violate the Constitution automatically call for reversal. However, in Chapman v. California, 386 U.S. 18 (1967), the Supreme Court held that before a federal constitutional error can be hald harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt. For an error to be harmless, it must have made no contribution to a criminal conviction.

It is specious indeed to contend, as does Appellee, that the error which the trial court committed in admitting evidence of the pre-trial identification was harmless. Mrs. Blaine's testimony

was irreparably tainted by such pre-trial identification. Her testimony and her testimony alone formed the basis for Appellant's conviction, since it is sheer conjecture to contend that the testimony of Officer Wiley constitutes "very strong alternative identification". (Brief for Appellee, p. 7)

The massive harm resulting from the trial court's ruling is demonstrated by Mrs. Blaine's failure to identify Appellant on those same unequivocal terms on the very day of the trial. At a Wade-Stovall hearing held just a few minutes prior to commencement of the trial, Mrs. Blaine, in response to a request that she attempt to identify Appellant in court, stated: "This one here looks like him. I couldn't swear to it." She then added: "I think this one here looks more like him." (Tr.12) Yet she unhesitatingly and conclusively identified him at the trial itself as she had at the presentment where Appellant was not represented by counsel. (Tr.53)1/

1/ To the contention that such uncertainty on the part of the witness should have been attacked by Appellant's trial Counsel on cross-examination, the Court is respectfully urged that as a matter of law the differing identification by the witness at presentment as against that in the Wade-Stovall hearing was alone sufficient grounds for unvalidating said presentment identification made without defendant having counsel and in derogation of his rights.

By its ruling the trial court thus permitted Mrs. Blaine's trial identification--tenuous at best in light of her failure to identify Appellant a few minutes before trial--to be reinforced by testimony concerning an identification made at presentment under circumstances of unfairness and suggestivity which entirely vitiate its validity.

Appellee's makeweight argument that it was not plain error for the trial court to admit evidence of a pre-trial identification to which no objection had been raised, simply cannot be accepted. Such distortion of the tenor of the trial proceedings is compounded by its strong reliance on the recent decision of this court in United States v. Waterstraat, D.C. Cir., No. 22708, decided November 14, 1969 (unpublished opinion), which Appellee claims is apposite. In support of this unsupportable contention it quotes at length from the discussion of counsel with the trial judge concerning the admissibility of the pre-trial identification (Tr. 22-23). A plain reading of the transcript compels a finding that Appellant's trial counsel did protest strongly to the introduction of such pre-trial identification. It is therefore misleading to assert that Appellant made no protest of the identification on Sixth Amendment or due process grounds and expressly waived any further objections. Appellant's "acquiescence" as Appellee terms it, was simply to the expected issuance of the trial court's ruling, rather than being a concession to the merits of that ruling.

Thus Appellee's reliance on Waterstraat, supra, has no dispositive merit. In Waterstraat the Appellant sought reversal solely by reason of the District Court's failure sua sponte to exclude certain identification evidence because of a pre-trial viewing by the victim at the time of appellant's presentment in general sessions court. This Court held that on that record the interest of justice did not warrant a finding of "plain error" within the meaning of Rule 52, Fed. R. Crim. P. But in Waterstraat the defense appeared to be satisfied with the prosecution's factual representations, and to believe that appellant had been exposed to no injury on that score. At no time did it object to the evidence in question.

Quite a different situation is presented in the instant Appeal. Appellant's trial counsel protested quite strongly, to the introduction of such evidence. Thus the "special circumstances" which led this court to its decision in Waterstraat are not present here.

Equally without force or effect is Appellee's insubstantial contention that there was no denial of due process in the pre-trial Court of General Sessions identification. The trial transcript and the Appellant's Brief make clear that Mrs. Blaine expected Appellant to appear in court on the morning of the Hearing. On cross-examination, defense counsel elicited that Mrs. Blaine definitely

came to court with the idea that she was going to identify the perpetrator of the crime. It is difficult to conceive of a more impermissibly suggestive identification procedure. Simmons v. United States, 390 U.S. 377 (1968). Appellant, in custody and escorted by police officers before the bench, was involuntarily cast in the role of a "bad guy" and thereby rendered vulnerable to being identified by any complainant who might be sitting in the courtroom as the perpetrator of some other, unrelated crime.

Furthermore, the patent unfairness of the pre-trial confrontation in the instant appeal is in no way lessened by a showing that the police had not affirmatively "assisted" the witness in making the identification. The Supreme Court in Wade, supra, was expressly concerned with unintentional as well as deliberate unfairness. And this court in Mason v. United States, ___U.S. App. D.C. ___, 414 F. 2d. 1176 (1969), noted that dangers may result from such diverse influences as the witness's desire to cooperate with the police, from his knowledge that he is expected to identify someone he sees and other factors. These are the very same factors present in the instant appeal. The totality of the circumstances indicates that there was present at the pre-trial confrontation the subtle suggestivity which this court found unacceptable in Mason, supra. As such it constitutes a clear violation of due process of law which compels the reversal of Appellant's conviction.

Having unequivocally held that a pre-trial identification at preliminary hearing in the absence of counsel is a violation of due process, this Court, it is respectfully urged, must also reach the ineluctable conclusion that a similar confrontation at presentment after arrest is equally violative of Appellant's due process rights. Appellant reiterates that the Wade and Mason decisions compel a finding by this Court that Appellant's lack of assistance of counsel during a pre-trial identification commands the reversal on due process grounds of his conviction based on such identification. Gilbert v. California, 388 U.S. 263 (1967).

There is another and most basic distinction from the Waterstraat ruling that renders it inapposite here. For that case did not, as does this, involve some other defect in the identification process under attack which required the Trial Court rejection of the presentment identification. In this case, the substantive defect in the witness' identification of Appellant (that is, the vast disparity between the identification on the presentment and at the Wade-Stovall hearing) has so aggravated the basic procedural defects in the presentment identification resulting from the absence of counsel, that the Trial Court should have on its own motion and as a matter of law rejected trial evidence of the presentment identification. Such a distinction, it should be noted, would require reversal here

without disturbing the essential force and validity of those other rulings involving the confrontation process which may hold absence of counsel not to be a disabling factor.

WHEREFORE, the premises considered, Appellant, Cedric Gilliam respectfully prays that his conviction in this case be reversed.

Respectfully submitted,

Arthur Stambler

Arthur Stambler

1737 DeSales Street, N.W.
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February 6, 1970

Lewis H. Goldman

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Court-Appointed Counsel for
Appellant Cedric Gilliam

CERTIFICATE OF SERVICE

I, Lewis H. Goldman, an attorney in the Law Offices of Arthur Stambler, do hereby certify that I have this 6th day of February, 1970, served copies of the foregoing by first-class United States mail, postage prepaid, upon the following:

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